

1 that?

2 A Yes.

3 Q Have you ever heard that Time
4 Warner would be willing to carry the NFL
5 Network on the digital or analog tier if the
6 NFL Network would reduce its price?

7 A I'm not sure if I've heard of
8 that.

9 Q So this is news to you.

10 A It's not shocking news, but this
11 is the first time that I'm hearing of it.

12 Q Okay. If you could turn to the
13 next page, "charter" is also general takeaways
14 and it says, "Cost is a BIG issue for digital
15 basic." Big is capitalized. Do you see that?
16 And had you been aware that cost was a big
17 issue for charter with respect to the NFL
18 Network?

19 A I'd say I'm sensitive to the issue
20 generally across all MVPDs including those who
21 carry it. But I had not -- I was not aware of
22 this particular issue concerning charter.

1 Q And the next one, "Mediacom cost
2 is a big issue as is digital basic." Do you
3 see that?

4 A Yes.

5 Q And then we get to WOW RCN and
6 again these are over builder competitors of
7 Comcast, right?

8 A Correct.

9 Q And these are companies that are
10 in region rivals of the type that you
11 suggested we should pay particular attention
12 to, right?

13 A Correct.

14 Q So it says, "WOW, had visit all
15 system and PRICING is the biggest issue.
16 Local folks are football fans." Do you see
17 that?

18 A Yes.

19 Q And then for RCN it says, "Have
20 measured all systems and COST is the big
21 issue. Want games, but don't want to pay the
22 high price." Do you see that?

1 A Yes. Despite that they carry the
2 NFL with the surcharge on a very highly
3 penetrated tier.

4 Q And so both of these in region
5 rivals of Comcast have very similar concerns
6 to Comcast about the NFL Network, didn't they?

7 A Yes.

8 Q Thank you. You can put that
9 aside.

10 JUDGE SIPPEL: Are you saying but
11 these WOWs still carry the NFL Enterprise
12 programming?

13 THE WITNESS: WOW carries the NFL
14 Network but does not take the surcharge and I
15 reflect that in that exhibit at the asterisk
16 at the bottom. I don't know if you recall and
17 RCN who is a much larger and more significant
18 in region rival carries the NFL Network with
19 the surcharge on a very highly penetrated
20 tier.

21 JUDGE SIPPEL: Which one is that?

22 THE WITNESS: RCN.

1 JUDGE SIPPEL: RCN takes it.

2 THE WITNESS: Yes.

3 JUDGE SIPPEL: Now the surcharge
4 gets from the games. Is that right?

5 THE WITNESS: Exactly.

6 BY MR. BURKE:

7 Q So WOW just has the NFL Network,
8 but without the games at a much lower price.

9 A Correct because NFL Network breaks
10 out its prices. They have a base rate.
11 Remember we were talking about the NER
12 earlier.

13 JUDGE SIPPEL: Yes, sir.

14 THE WITNESS: They have a base
15 rate and then they have a surcharge if you
16 want to the eight games.

17 BY MR. BURKE:

18 Q Do you know? You say that RCN
19 carries the NFL Network on a highly penetrated
20 tier. Did I hear you correctly?

21 A If my memory serves me right it's
22 fairly highly penetrated. I don't have the

1 number precise in my head, but I remember it's
2 expressed as a percentage of its digital
3 subscribers. It was very high and then you'd
4 have to correct for what fraction of it is
5 digital. But you probably had the numbers in
6 front of you.

7 Q The number I had was [REDACTED] percent
8 which --

9 A Excuse me?

10 Q The number I have is [REDACTED] percent.
11 Does that refresh your recollection as what
12 penetration is (Audio noise) NFL Network in on
13 RCN?

14 A That sounds right. I have ear
15 problems.

16 Q Would you prefer to take a break,
17 Dr. Singer?

18 A No, I'll be fine in a few minutes.

19 JUDGE SIPPEL: It's 20 of 11:00
20 a.m. Yes, do you want to take your morning
21 break? I'm sorry. I'm not trying to push
22 this.

1 MR. BURKE: I probably I'd say
2 have about another half hour-ish or so. So if
3 you wanted to take a quick break, Dr. Singer,
4 we're happy to do that to accommodate you.

5 THE WITNESS: No, I think I'm
6 okay. I'm fine.

7 JUDGE SIPPEL: All right. Thank
8 you, sir.

9 BY MR. BURKE:

10 Q So I think the question was you
11 were claiming that it's a highly penetrated
12 distribution on RCN and our numbers suggest
13 that it's about [REDACTED] percent distribution. Is
14 that consistent with your recollection?

15 A My recollection is a little higher
16 than [REDACTED] percent, but [REDACTED] doesn't sound
17 unreasonable and I think [REDACTED] is significant
18 penetration.

19 Q And on RCN, it is on a digital
20 tier. Isn't that right? It's not on an
21 analog tier.

22 A Correct.

1 Q And the relief that your client is
2 seeking in this case is to put the NFL Network
3 on Comcast analog tier.

4 A No, that's the relief and we kind
5 of quibbled over this earlier and I just want
6 to say it again so that Your Honor understands
7 it. The NFL Network if I may speak for them
8 is seeking equal treatment. So if you carried
9 your affiliated national sports networks on
10 your digital tier which only is covered by
11 [REDACTED] of your [REDACTED] subscribers
12 roughly then it would be perfectly consistent
13 with the Cable Act to carry NFL Network on
14 digital tier.

15 You keep the relief we're seeking
16 is carriage on expanded basic. That's
17 conditional. This is very important on your
18 decision to keep your affiliated national
19 sports networks on the expanded basic tier.

20 Q The regression analysis that you
21 did to generate the fair market price for
22 Comcast was based upon analog distribution,

1 wasn't it?

2 A The sample included carriers who
3 generally carried NFL on a highly penetrated
4 tier, but it also includes RCN and it also
5 adjusted for the extent of the penetration.
6 So I'm not certain that the number that I
7 provided or the model itself could not also be
8 used to project the number for D2 also.

9 Q But the actual projection that you
10 made was for what Comcast would pay to carry
11 this on its expanded basic tier. Isn't that
12 right, Dr. Singer?

13 A That is correct.

14 JUDGE SIPPEL: Let me see if I can
15 -- Is it all right? I'm sorry to interrupt.

16 MR. BURKE: Please, Your Honor.

17 JUDGE SIPPEL: You gave the offer
18 NFL to include to be broken down with basic
19 rate and surcharge. Is that correct? And I'm
20 only talking about --

21 THE WITNESS: Correct. When I
22 predict based on all the other NVPDs that

1 carry NFL Network my best prediction is [REDACTED] and
2 that is the NER. So that would include the
3 surcharge.

4 JUDGE SIPPEL: [REDACTED]

5 THE WITNESS: [REDACTED] per
6 subscriber.

7 JUDGE SIPPEL: Yes. What would be
8 the breakdown of the [REDACTED] between the base rate
9 and the surcharge?

10 THE WITNESS: According to my
11 model it would be roughly I think it's [REDACTED]
[REDACTED] for the surcharge.

13 JUDGE SIPPEL: [REDACTED] for the
14 surcharge.

15 THE WITNESS: Right, and then the
16 residual would be the base rate.

17 JUDGE SIPPEL: Am I doing it
18 right? [REDACTED]

19 THE WITNESS: Correct. And as an
20 alternative I would offer the actual contract
21 that the NFL and Comcast entered into which
22 actually breaks out the rate between the base

1 rate and the surcharge.

2 JUDGE SIPPEL: Okay. Well, just

3 for my purposes here, I'm just looking for

4 ball park. I'm trying to get a feel on this.

5 THE WITNESS: To be fair, I was

6 really trying to predict the all-inclusive

7 NER. So I'm not all that comfortable saying

8 that my [REDACTED] prediction can be decomposed

9 that way. I'm kind of using a coefficient

10 from the regression right now to try to do

11 that math for you. But most of it, I think

12 this is very fair, that the vast majority of

13 the [REDACTED] that I'm predicting as the fair

14 market value is driven by the surcharge.

15 JUDGE SIPPEL: All right. That's

16 an interesting way of putting it, but I'm

17 following you. Now let me ask this one then.

18 We go back to the WOWs. There are two sets of

19 WOWs. You have a WOW that was paying the

20 surcharge and one that wasn't or it was a

21 group that wasn't. The ones that didn't pay

22 the surcharge am I right in saying that they

1 would be getting it for approximately [REDACTED]
[REDACTED] when they're getting basic? They're
3 getting basic NFL programming without the
4 games?

5 THE WITNESS: Correct. And I have
6 in my testimony and if you want I can open it
7 up. I'm just reluctant to do it by memory.
8 But WOW is paying some base rate and it is a
9 lot lower than what everyone else is paying
10 and I control for that in my regression with
11 the dummy variable that says whether or not
12 you're carrying the surcharge.

13 JUDGE SIPPEL: All right. Okay.
14 I didn't ask that question, but that's fine.

15 THE WITNESS: Okay.

16 JUDGE SIPPEL: Now so assuming
17 then that the surcharge, then you've got WOW.
18 Let's say the richer WOWs are going all the
19 way with the surcharge and they get [REDACTED].
20 Now what is the [REDACTED]? What is that based
21 on? Is that just whatever the market will
22 bear or is it related to any kind of a cost

1 analysis or how do you get [REDACTED]?

2 THE WITNESS: Right. So what I've

3 done when I look at the contracts for most of

4 them, most of the contracts in my database,

5 they actually break out the surcharge and the

6 NER. It think there's one exception to that

7 rule and what I've done is I've controlled for

8 in the regression model to try to figure out

9 what's the incremental cost when you control

10 for all the other characteristics of the MSO,

11 what on average is the incremental cost of the

12 effect of carrying the eight game package and

13 according to my model the average price effect

14 is about [REDACTED] per month and that is

15 corroborated by the fact that if I just look

16 at the surcharges that are in my sample of

17 voluntary contracts and I just take the simple

18 average, I get [REDACTED]. So either you can use

19 the regression coefficient or you could just

20 look at the contracts, write down the nine

21 surcharges that we have for the largest NVPDs

22 that are carrying NFL and just take a simple

1 average.

2 Some pay more than [REDACTED] Some pay

3 [REDACTED]. Some pay [REDACTED]. I think it looks like [REDACTED]

4 [REDACTED]. If you take an

5 average, you get [REDACTED].

6 JUDGE SIPPEL: All right. But

7 still my question remains which is how do you

8 come up with what are the cost factors that go

9 into that [REDACTED], whatever it is, and

10 how do you come up with the number? It's just

11 there. So you're going after the fact. The

12 number is there. So I bring it into my

13 calculations. You don't care how the number

14 got there.

15 THE WITNESS: As valuation expert,

16 what I'm trying to do is just look at what the

17 market rate is between two voluntarily

18 parties, a willing buyer and a willing seller

19 and they struck, entered into a contract that

20 said that the surcharge on average for the

21 eight game package is [REDACTED]. It shows up

22 contract after contract after contract. We

1 have 240 of these contracts. I looked at the
2 nine largest which wiped out about 95 percent
3 of all the subs of the NFL Network.

4 But I don't ask why and we can go
5 into why, where does the [REDACTED] come from. But I
6 just look at the plain language in the
7 contract. They will list for you what the
8 surcharge is. I told you the highest one that
9 I think I remember is the [REDACTED] surcharge.
10 The lowest one that I can remember is [REDACTED]

11 [REDACTED] You see a lot of [REDACTED] I remember
12 there. Then there's [REDACTED]. There are some that
13 [REDACTED] and there's one that [REDACTED] [REDACTED]

14 JUDGE SIPPEL: All right. Let me
15 give you a [REDACTED] crude example and I'm just
16 simply trying to get my understanding
17 straight. If I go down here to the market
18 down here on South Street, I can get – Let's
19 say I'm buying crabs for \$100 a bushel today.
20 I go back there next week and it's \$90 a
21 bushel. Well, that's telling me there's a
22 reason for why because that's what the market

1 will carry and it's because there's been a
2 glut of crabs this week or something to that
3 effect.

4 I'm saying is there anything like
5 that with the surcharges. I mean how does
6 this number come about?

7 THE WITNESS: What explains the
8 variation between the [REDACTED] and the [REDACTED]?

9 JUDGE SIPPEL: Why is there a
10 market pricing for any cent? [REDACTED]
11 [REDACTED], starting with that, what are the
12 ingredients that go into it? We know what
13 crabs are and we know that people have to
14 spend money to get the crabs. So there's a
15 rationale basis for why it's \$100 a bushel.
16 But some of it, a big chunk of it, is that's
17 what the market will carry, will bear.

18 THE WITNESS: Right.

19 JUDGE SIPPEL: So what are we
20 talking about with the [REDACTED] [REDACTED]? Does it cost
21 anything? Is there a cost of doing business
22 in connection with that [REDACTED] [REDACTED] or is that

1 just the negotiated price?

2 THE WITNESS: It's the negotiated

3 price. It's the license fee for carriage and

4 why are all these guys willing to spend [REDACTED]

5 [REDACTED] It's because of the love of football.

6 It's what causes me to TIVO a game when I'm

7 out for dinner on a Saturday night and watch

8 it at midnight and stay up until 3:00 a.m. in

9 the morning. That's what these MVPDs are

10 expressing. They are expressing their

11 subscribers' intense interest and fascination

12 with football.

13 JUDGE SIPPEL: Well, that's an

14 abstraction. I mean if you could get [REDACTED] [REDACTED]

15 for let's say for Mahler recordings you would

16 be in the same ball park, right? That's just

17 what people want to hear. They want to hear

18 Mahler. So we can get [REDACTED] by showing or

19 by producing moler for it. Here they want to

20 see [REDACTED] [REDACTED] worth of football. So that's it.

21 That's like what it costs to go in, to give

22 you a ticket to the ticket taker and walk in

1 the gate if the thing was -- if you were going
2 to the game.

3 THE WITNESS: Right. But as an
4 economist who is just coming at this ex post
5 and I'm looking at a contract between a
6 willing buyer and a willing seller and they
7 said [REDACTED] I can't question if that's the
8 right value and in fact the FCC tells me in
9 that first prong of that eight prong test for
10 how you derive fair market value in a carriage
11 dispute is they say, "Go look at the
12 contracts. Go see what other people
13 voluntarily paid for it." So as an economist
14 when I see the number [REDACTED] that's what the
15 market is. That's where the market is going.

16 JUDGE SIPPEL: Are you doing it
17 because the FCC tells you to do it or are you
18 doing it because you're an economist and -- I
19 mean if the FCC didn't tell you to do that,
20 would you do it?

21 THE WITNESS: That's exactly how I
22 would do it too.

1 JUDGE SIPPEL: So they got it

2 right this time.

3 THE WITNESS: They had some smart

4 people I think figuring out the framework.

5 JUDGE SIPPEL: There is no

6 question about they had smart people. Okay.

7 I'm finished with my education here.

8 MR. BURKE: Thank you, Your Honor.

9 BY MR. BURKE:

10 Q Just a few things that came out in

11 the course of that that I wanted to follow up

12 on. You're saying the average surcharge is [REDACTED]

13 [REDACTED] Is that right, Dr. Singer?

14 A In my sample of the nine largest

15 MVPDs that carry NFL Network in 2008, I'm just

16 trying to be precise, the average surcharge

17 and this is a simple average I believe comes

18 to either [REDACTED] or [REDACTED]

19 Q You projected a price for Comcast

20 of [REDACTED] per sub. Is that right?

21 A Correct.

22 Q So does that mean that the rest of

1 the NFL Network without the team, without the
2 eight games, is really worth about [REDACTED] [REDACTED]

3 [REDACTED]

4 A No, that's not what it means.

5 It's that my best estimate of what a
6 hypothetical negotiation between Comcast and
7 NFL setting aside this conflict of interest
8 arguments (Audio noise) programming would
9 produce [REDACTED] [REDACTED]

10 Now how that would have been
11 allocated in the contract? I don't know, but
12 we can actually look at the contract that was
13 signed between the NFL and Comcast and see how
14 they decomposed it.

15 MR. BURKE: I would like to ask
16 you a few questions about your regression
17 analysis and I'm wondering if we could get
18 back the board. It was 192 that we had a
19 board of yesterday. Is that over there?
20 Would you mind, Your Honor, if we put that
21 back up?

22 JUDGE SIPPEL: No. Boards are

1 very helpful. 192.

2 MR. BURKE: Yes. And I believe it

3 was a board.

4 MR. SCHMIDT: Which one was it?

5 MR. BURKE: 192, it's this one.

6 JUDGE SIPPEL: Are you

7 comfortable, Doctor? We're getting close.

8 THE WITNESS: How are we doing? I

9 mean, I don't want to rush you. If you want

10 to go to 5:30 p.m.

11 MR. BURKE: I don't want to do

12 that. I do think we'll be a little while

13 longer. If you want to take a ten minute

14 break.

15 THE WITNESS: I think I would.

16 JUDGE SIPPEL: Why don't we do it

17 while you set the board up.

18 MR. BURKE: Thank you.

19 JUDGE SIPPEL: Let's take a ten

20 minute break. Off the record.

21 (Whereupon, a short recess was

22 taken.)

1 JUDGE SIPPEL: We're back on the
2 record.

3 MR. BURKE: Welcome back, Dr.
4 Singer.

5 BY MR. BURKE:

6 Q Just sort of tying up some themes
7 or some questions that came up before our
8 break, you remember His Honor was asking you
9 some questions about the costs, and how costs
10 might influence your calculations; do you
11 recall that?

12 A I remember the questions, right.

13 Q So just - is it true that the NFL
14 Network gets the rights to the eight games
15 that it broadcasts for free from the NFL?

16 A Well, for free is a little
17 dangerous in the sense that of course they
18 have to give up equity to the NFL, and number
19 two they have to forego whatever might be paid
20 to them by somebody else who wanted to own
21 those rights.

22 Q You said they'd have to give up

1 equity. I mean they were already a wholly
2 owned subsidiary of the NFL before this ever
3 happened; right?

4 A Right.

5 Q So they didn't have to give up any
6 additional equity in exchange for the rights
7 to these games, right?

8 A That's correct.

9 Q And for incremental sales to a
10 given cable company, if you are making a car
11 each car costs some money to make and you have
12 to cover those costs when you see each
13 additional car, is that right?

14 A Correct.

15 Q And it's a little bit different in
16 the video world in the sense that the marginal
17 cost of an additional sale of programming is
18 essentially zero or pretty close to zero;
19 isn't that right?

20 A I'm with you with the exception of
21 one word, with respect to the sale. I don't
22 want to suggest there is no selling cost to

1 get the next customer.

2 But you are right, when we are
3 talking about intellectual property in
4 general, and video programming in particular,
5 to cut the next video or to cut the next album
6 or to allow somebody to use my patent in
7 general there is not a new marginal cost of
8 production. All the cost was invented in the
9 up front, in acquiring, and developing the
10 idea.

11 Q So here the costs, the biggest
12 costs for a cable network are typically the
13 content itself; isn't that right?

14 A Now you are switching back - so
15 from the perspective of the cable network what
16 is the biggest component of the - I guess I'm
17 sorry, I don't follow that.

18 Q If I was going to start a new
19 cable network, the biggest cost I'm going to
20 face is actually getting, acquiring the good
21 content to make that network valuable and
22 attractive, right?

1 A That's correct.

2 Q And in this case that content, the
3 eight games, was essentially given to the NFL
4 Network for [REDACTED]; isn't that right?

5 A Well, again, I'm reluctant to say
6 for [REDACTED] for two reasons, one is that the
7 NFL Network if you think of it is a separate
8 entity and has to give equity to the NFL in
9 exchange for that consideration.

10 The other way to think about it
11 is, had the NFL not given it to the NFL
12 Network it would have sold it to somebody
13 else, potentially Comcast for some huge lump
14 sum.

15 [REDACTED]
16 [REDACTED]

17 Q Well, it's free from the
18 perspective of the NFL Network. They didn't
19 pay any thing to the NFL for that content;
20 isn't that right? There are [REDACTED] being
21 transferred to the NFL in exchange for the
22 eight games?

1 A I think that is fair with the
2 caveat that if you consider the NFL Network as
3 a stand alone entity it is effectively giving

4 [REDACTED]

5 [REDACTED]

6 Q I thought we went through that. I
7 mean the NFL Network was already a wholly
8 owned subsidiary before it ever got the right,
9 so there was no giving up of additional
10 equity.

11 A No, but the NFL Network you could
12 think of it as giving up equity on the day
13 that it was born to get some programming
14 rights from the NFL. Now you are just getting
15 incremental programming package with the APM
16 package.

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 JUDGE SIPPEL: Can I follow up on